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HYDROTHERMAL ENERGY AND MINERALS, INC.

IBLA 74-307 Decided February 7, 1975

Appeal from separate decisions of Oregon State Office, Bureau of Land Management, rejecting applications OR 11701 and OR 11708 for noncompetitive geothermal leases.

Affirmed as modified.

1. Bureau of Land Management -- Geological Survey -- Geothermal Leases: Known Geothermal Resources Area

There is no authority for a State Director, Bureau of Land Management, to make a determination of a known geothermal resources area. Instead, that authority has been delegated by the Secretary of the Interior to the Director, Geological Survey. KGRA determination must be based upon the evidentiary factors stated in section 2(e) of the Geothermal Steam Act of 1970.

2. Act of December 24, 1970 -- Geothermal Leases: Competitive Leases -- Geothermal Leases: Known Geothermal Resources Area -- Geothermal Leases: Noncompetitive Leases

Section 4 of Geothermal Steam Act of 1970 authorizes competitive bidding as sole basis for issuance of geothermal leases for lands determined to be within a KGRA.

3. Act of December 24, 1970 -- Geothermal Leases: Competitive Leases --Geothermal Leases: Known Geothermal Resources Area -- Geothermal Leases: Noncompetitive Leases

Section 4 of Geothermal Steam Act of 1970 directs competitive bidding for geothermal leases on lands which are determined to be within a KGRA before the issuance of a lease on such lands, even though the KGRA determination is made after the pertinent application is filed.

4. Act of December 24, 1970 -- Geothermal Leases: Competitive Leases --Geothermal Leases: Known Geothermal Resources Area -- Geothermal Leases: Noncompetitive Leases

Competitive bidding requirements of first sentence of section 4 of Geothermal Steam Act of 1970 apply to those applications filed during January 1974 filing period, and State Office rejections of appellant's January 1974 noncompetitive lease applications are proper under 43 CFR 3210.4.

APPEARANCES: Jerome S. Bischoff, Esq., Portland, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Hydrothermal Energy and Minerals, Inc. (Hydrothermal) has appealed from separate decisions, each dated April 12, 1974, wherein the Oregon State Office, Bureau of Land Management, rejected applications OR 11701 and OR 11708 for noncompetitive geothermal leases. Each decision declared that the lands applied for are within a "known geothermal resources area" 1/ (KGRA) by virtue of competitive inter-

1/ As defined in section 2(e) of the Geothermal Steam Act of 1970, 30 U.S.C.A. § 1001(e), a "known geothermal resources area" is one "* * * in which the geology, nearby discoveries, competitive interests, or other indicia would, in the opinion of the Secretary, engineer a belief in men who are experienced in the subject matter that the prospects for extraction of geothermal steam or associated geothermal resources are good enough to warrant expenditures of money for that purpose."

est 2/ demonstrated. Hydrothermal's applications were filed on January 31, 1974, during the initial 30-day filing period following the date upon which the regulations 3/ permitting geothermal leasing of United States-owned lands became effective.

Appellant contends essentially that the KGRA competitive leasing provisions are not applicable to filings made during the initial 30-day filing period provided by the regulations, and that in any event a determination that a KGRA exists presupposes an administrative finding based on evidentiary factors.

[1] We accept the contention of appellant that a KGRA determination requires more than the mere declaration by a State Director that a KGRA exists. KGRA determinations must be based upon evidentiary factors which are stated in section 2(e) of the Geothermal

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2/ The term "competitive interest" which is used in section 2(e) of the Geothermal Steam Act, note 1 supra, is defined in the regulations governing geothermal leasing, 43 CFR 3200.0-5(k)(3), as follows: "Competitive interest" shall exist in the entire area covered by an application for a geothermal lease if at least one-half of the lands covered by that application are also covered by another application which was filed during the same application filing period, whether or not that other application is subsequently withdrawn or rejected." * * * As section 2(e) of the Act makes clear, competitive interest is but one of several criteria that must be considered together in determining whether or not an area is a KGRA.

Application OR 11701 was in conflict for more than one-half the lands it covered with applications OR 11713 and OR 11763; application OR 11708 was similarly in conflict with application OR 11877.

3/ 43 CFR 3200 et seq., which became effective on January 1, 1974.

Steam Act of 1970, 30 U.S.C.A. § 1001(e) 4/, and in the geothermal leasing regulations. Competitive interest is one of these factors. The authority to make KGRA determinations has been delegated by the Secretary of the Interior to the Director, Geological Survey, 220 DM 4.1(H). We have found no authority for a State Director to make a determination of a KGRA.

When they were promulgated, the State Office decisions were in error to reject the subject applications on account of being for lands in a KGRA. The issue is now moot, however, as an authorized official of the Geological Survey on May 3, 1974, acting in accordance with section 2(e) of the Geothermal Steam Act, supra, subsequently determined that the lands included in the subject application are in fact within undefined additions to the Vale Hot Springs KGRA and the McCredie Hot Springs KGRA, Oregon, respectively, effective as of February 1, 1974. The State Office decisions are so modified.

We find nonpersuasive appellant's argument that applications for noncompetitive geothermal leases filed prior to the effective date of a KGRA determination may be accepted.

4/ 30 U.S.C.A. § 1001(e) reads:

"[K]nown geothermal resources area" means an area in which the geology, nearby discoveries, competitive interests, or other indicia would, in the opinion of the Secretary, engender a belief in men who are experienced in the subject matter that the prospects for extraction of geothermal steam or associated geothermal resources are good enough to warrant expenditures of money for that purpose.

[2] Section 4 of the Geothermal Steam Act, 30 U.S.C.A. § 1003, requires that:

> If lands to be leased under this Act are within any known geothermal resources area, they shall be leased to the highest responsible qualified bidder by competitive bidding under regulations formulated by the Secretary. If lands to be leased are not within any known geothermal resources area, the qualified person first making application for the lease shall be entitled to a lease of such lands without competitive bidding. * * *

Thus, this section of the Act authorizes competitive bidding as the sole basis for issuance of geothermal leases for lands determined to be within a KGRA.

Appellant has raised the question of the proper meaning of the phrase "* * * which are not within any KGRA * * *" found in the first sentence of 43 CFR 3210.1(b), 5/ and has argued that this language does not allow KGRA

determinations following the time of the filing of applications to preclude the noncompetitive leasing of pertinent lands. Since a decision upon the ultimate issue of this appeal requires consideration of the application of the Geothermal Steam Act to the facts and issues presented herein, and because section 4 of this Act contains phraseology substantially identical to that language in the regulations which appellant has placed in dispute, this

5/ 43 CFR 3210.1(b):

"Lands and deposits subject to disposition under this part which are not within any KGRA will be available for leasing after the effective date of these regulations. * * *"

Board will weigh appellant's arguments as to the language in the regulations just as they would apply to the language in the Act, specifically in section 4.

The meaning of "are within" from the first sentence of section 4 of the Act, and "are not within" from the second is brought into question by appellant's arguments. The proper application of these words to the circumstances of post-application, pre-lease issuance KGRA determination is a question of first impression for this Board in the geothermal leasing context, but the analogy to the identical issue in the subject area of oil and gas leasing is so compelling, for the reasons given below, that this Board is of the opinion that the Congress, in enacting the Geothermal Steam Act in its present form, intended for the rule applied in oil and gas matters to be followed in geothermal leasing.

Section 2 of the Mineral Leasing Act Revision of 1960, 74 Stat. 781, amended sections 17, 17(a) and 17(b) of the Mineral Leasing Act of February 25, 1920, as amended, to state that:

> Sec. 17(a) * * *
>
> (b) If the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations * * *.

> (c) If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. * * *

30 U.S.C. § 226 (1970).

The language employed in section 4 of the Geothermal Steam Act is for all material purposes, except one which is discussed below, similar to the above language from the Mineral Leasing Act. Further, in its report on the Geothermal Steam Act, the House Interior and Insular Affairs Committee specifically analogized the Geothermal Steam Act to the Mineral Leasing Act, saying that:

> [This bill] provides statutory authority for the Secretary of the Interior to issue leases for the development of geothermal steam and the associated geothermal steam resources underlying the public lands in much the same manner as he is now authorized to lease land for the development of their oil and gas deposits under the Mineral Leasing Act of 1920, as amended. 6/

The close similarity between section 4 of the Geothermal Steam Act and subsections 17(b) and 17(c) of the Mineral Leasing Act seems well established.

6/ H.R. Rep. No. 1544, 91st Cong., 2d Sess., 3 U.S. Code Cong. and Admin. News, p. 5116.

In enacting the Geothermal Steam Act the Congress must have been aware of the construction which the Department of the Interior in an interpretative rule, Solicitor's Opinion, 74 I.D. 285 (1967), had given to the language of 17(b) of the Mineral Leasing Act when implementing that part of that statute. The Solicitor declared that lands may not be leased noncompetitively if they become included within the known geologic structure of a producing oil or gas field before the lease is actually issued, even though such lands had not been deemed to have been within the structure at the time of the filing of the lease application. This rule is now codified into regulation at 43 CFR 3110.1-8, Minetta A. Miller, 17 IBLA 245 (1974); Geral Beveridge, 14 IBLA 351, 81 I.D. 80 (1974); Robert B. Ferguson, 9 IBLA 275 (1973); James W. McDade, 3 IBLA 226 (1971), aff'd., McDade v. Morton, 494 F.2d 1156 (D.C. Cir. 1974).

[3] In light of the above, this Board holds that section 4 of the Geothermal Steam Act directs competitive bidding for geothermal leases on lands which are determined to be within a KGRA before the issuance of any
noncompetitive geothermal leases on the lands in issue, even though the KGRA determination is made after the pertinent application is filed. Thus, we affirm the rejections of appellant's applications.

In support of this conclusion, the District Court for the District of Columbia, faced in McDade, supra, with a post-

application, pre-issuance determination that certain lands were within a known geologic structure in the oil and gas leasing context, held that:

> The unambiguous language of the Mineral Leasing Act states that leases for land within a known geologic structure of an oil or gas field shall be leased by competitive bidding. The logical and sensible regulatory result under such wording is to preclude any type of leasing other than by means of competitive bidding whenever it becomes apparent that the applied for leases involve lands within a known geologic structure. (Emphasis in original.)

353 F. Supp. at 1013.

A qualification expressed in section 17(b) of the Mineral Leasing Act, but not in section 4 of the Geothermal Steam Act, is the requirement that before competitive bidding shall be applicable, the known geologic structure must include a producing oil or gas field. This difference, however, does not distinguish the meaning of the phrases "are within" and "are not within" as used in section 4 of the Geothermal Steam Act from that of the identical usage in subsections 17(b) and (c) of the Mineral Leasing Act. The Department's rule, Solicitor's Opinion, supra, and the holding in McDade both specifically reject the theory that a lease applicant has any vested rights in the lands applied for, and this Board hereby applies the same rule to geothermal lease applications. We can see no suggestion from the language in section 4 of the Geothermal Steam Act that any

more rights are created in an applicant under section 4 than are given by the language of sections 17(b) and (c) of the Mineral Leasing Act.

[4] Likewise, there is no suggestion in section 4, or elsewhere, of the Geothermal Steam Act of an exemption from competitive bidding for those lands which were applied for during the initial 30-day filing period. Thus, we hold that the competitive bidding requirements of the first sentence of section 4 apply to those applications filed during the January 1974 filing period, and that the State Office rejections of appellant's noncompetitive lease applications which were filed during that period were proper under 43 CFR 3210.4.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as modified.

Douglas B. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Newton Frishberg
Chief Administrative Judge